Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-1489

* * *

BOB BULLOCK, COMPTROLLER OF
PUBLIC ACCOUNTS OF THE STATE OF TEXAS,

Petitioner

V.

DAY AND ZIMMERMAN, INCORPORATED,

Respondent

AND

UNITED STATES OF AMERICA,

Intervenor

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * *

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May, 1975

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IN THE

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NO. _____

Bob Bullock, Comptroller of Public Accounts
of the State of Texas,
Petitioner

V.

Day and Zimmerman, Incorporated,
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and

United States of America,
Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner, Bob Bullock, Comptroller of Public Accounts of the State of Texas, successor in office to Robert S. Calvert, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas in this proceeding.

OPINIONS BELOW

The opinion of the 126th Judicial District Court of Travis County, Texas, is not reported but is reproduced as Appendix II hereto. It also appears in

Record 1, Transcript, p. 35. The opinion of the Court of Civil Appeals, Third Supreme Judicial District of Texas, is reported at 504 S.W.2d 945. The Opinion of the Supreme Court of Texas is reported at 519 S.W.2d 106 and is also reproduced as Appendix III hereof.

JURISDICTION

The Judgment of the Supreme Court of Texas was entered on January 29, 1975. Petitioner timely filed a Motion for Rehearing which the Supreme Court of Texas denied on the 5th day of March, 1975, and this petition for certiorari was filed within ninety (90) days of that date as required by 28 USC 2101(c). The Court's jurisdiction is invoked under 28 USC 1257 (3).

QUESTIONS PRESENTED

1. Whether the immunity of the United States from payment of state sales taxes should be extended to independent contractors performing services for the United States under cost-plus-fixed-fee contracts.

2. Whether the title provision /Art. VI-B(c)/ in the prime contract between Day and Zimmerman and the United States effected a "resale" of certain tangible personal property from Day and Zimmerman to the United States as contemplated by Art. 20.01(S) and Art. 20.04 (N), Title 122A, Taxation-General, V.A. T.S.

STATUTES INVOLVED

Articles 20.01 G(1), I(1), J(1)(a), K(1), R and S; 20.02; 20.021(A), (G) and (I); 20.03; 20.04 A, C, F, and N, all of Chapter 20, Title 122A, Taxation-General, V.A.T.S. All of these statutes are found in the separately bound Appendix. The alphabetization of Article 20.04 changed in 1969. The references given are for the statutes in effect for the period in question (1964-1968) and current citations for these statutes are provided in the Appendix.

STATEMENT OF THE CASE

Respondent, Day and Zimmerman, a Maryland corporation with principal offices in Philadelphia, Pennsylvania, is the contractor-operator of Lone Star Army Ammunition Plant (hereinafter referred to as LSAAP) located in Bowie County, Texas, near Texarkana. Under its contract with the Intervenor-the United States, Day and Zimmerman loads, assembles, and packages ammunition and components thereof. Pursuant to the provisions of the Texas Sales and Use Tax Act, Vol. 20A, Title 122A, Tax.-Gen., V.A.T.S. and Article 1066(C), V.A.T.S. (all pertinent portions are reproduced as Appendix I), Petitioner sought to tax those supplies purchased and consumed by Day and Zimmerman in the performance of its contract for the period from April 1, 1964, to October 1, 1968. The taxes were not levied on any of the component parts that went into the assembled ammunition and munitions received by the United States, but were imposed only on taxable supplies such as computer time and other equipment leased by Day and Zimmerman, station-

ery, toilet paper, pencils, other secretarial supplies, ice, light bulbs and charges for the printing and supplying of the plant newspaper for Day and Zimmerman employees.

After exhausting all administrative appeals before the Petitioner, Day and Zimmerman sued Petitioner on January 22, 1971, in the 126th District Court of Travis County, Texas, requesting refund of the taxes at issue. On August 5, 1971, the United States intervened because under its contract with Day and Zimmerman, the United States is required to reimburse Day and Zimmerman for all costs incurred in the performance of the contract, including taxes, penalty and interest paid by Day and Zimmerman. (Record 2, Stipulation 15).

In a non-jury trial the court rendered Judgment on May 25, 1973, for Day and Zimmerman and the United States to recover $112,668.42 in taxes, penalty and interest. (Record 1, Transcript p. 35). The Petitioner appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. That court reversed and rendered judgment that Day and Zimmerman and the United States take nothing by their suit. (Record 5). The Court of Civil Appeals overruled the Motion for Rehearing on February 6, 1974, and Day and Zimmerman and the United States then filed Application for Writ of Error in the Supreme Court of Texas on March 11, 1974. (Record 8). The Supreme Court of Texas reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the trial court in all respects. (Record 12). In so doing the court held Day and Zimmerman to be an independent con-

tractor, not an agent of the United States, and that Article VI-B(c) of the contract effected a "sale" from Day and Zimmerman to the United States which is exempted from taxation by the United States Constitution.

Petitioner's Motion for Rehearing in the Supreme Court of Texas was overruled on the 5th day of March, 1975. (Record 15).

REASON FOR GRANTING THE WRIT

The decision of the Supreme Court of Texas granting this contractor immunity from Texas sales taxes directly and irreconcilably conflicts with three decades of decisions of this Court concerning entities contracting with the United States, beginning with the 1941 case of Alabama v. King & Boozer, 314 U.S. 1.

Day and Zimmerman contracts with the United States to provide the expertise necessary to produce munitions for the United States Army. The United States pays Day and Zimmerman all costs incurred plus a fixed fee. In performing the contract, Day and Zimmerman must purchase two categories of goods: (1) materials which are used in the actual manufacture of the munitions; (2) supplies which Day and Zimmerman consumes and which do not directly enter the manufacturing process. The law of the State of Texas provides that those materials which become an integral or component part of a manufactured product are not taxable. /Article 20.04(C)(1)(a), Appendix, p. 9/ Petitioner contends

that the Texas Sales Tax Act does impose a sales tax on those consumable supplies purchased and used solely by Day and Zimmerman. /Art. 20.04 (C)(1)(b)(ii)(iii), Appendix, p. 9/.

TAX LIABILITY BASED ON THE LEGAL-INCIDENCE TEST

The primary issue in this case is whether or not a sales tax assessed by a State against an independent contractor doing business with the United States under a cost-plus contract wherein the United States must reimburse the contractor for all costs, including taxes, is, in effect, a tax against the United States. The repugnancy of a tax to the United States Constitution is determined by the legal incidence of the tax as opposed to its ultimate economic burden.

This Court, in James v. Dravo Contracting Co., 302 U.S. 134 (1937), established the test of looking to the "legal incidence" of a state tax in deciding whether that tax is validly assessed against an independent contractor performing its contract with the United States. In the 1941 case of Alabama v. King & Boozer, supra, a case whose fact situation is synonymous to the case at bar, and in Curry v. United States, 314 U.S. 14 (1941) this Court held that in determining the validity of Alabama Sales and Use Taxes, respectively, the implied constitutional immunity of the United States was not a bar to the imposition of the taxes on a cost-plus type government independent contractor.

The "legal incidence" test as established by this Court in these cases supports the principle that a

mere showing of the burdensome effects of the tax upon the United States is insufficient to invoke constitutional immunity.

The legal versus the economic incidence test was best summarized in the so-called "Michigan cases." In United States v. City of Detroit, 355 U.S. 466, 472 (1958), this Court held:

> "We are aware of course that the general principles laid down in Dravo, King & Boozer and subsequent cases do not resolve all the difficulties in the area of intergovernmental tax immunity, but they were adopted by this Court, with the full support of the Government, as the least complicated, the most workable and the proper standards for decision in this much litigated and often confused field and we adhere to them."

In City of Detroit, et al, v. Murray Corporation of America et al, 355 U.S. 489, 494 (1958), this Court stated:

> "Of course the government will eventually feel the financial burden of at least some of the tax but the one principle in this area which has heretofore been clearly settled is that the imposition of an increased financial burden on the government does not by itself invalidate a state tax."

The facts in this case, including the sale of

certain supplies to Day and Zimmerman, the passing of title to these supplies to the United States upon delivery by the vendors, and the reimbursement provision in the contract are synonymous with the facts in Alabama v. King & Boozer, supra. Therefore, the legal incidence of the taxes is not on the United States so as to invoke the doctrine of implied constitutional immunity even though the United States has contractually obligated itself to reimburse Day and Zimmerman for these taxes. This obligation is found in Title IV-A(1)(j) of the Prime Contract as follows:

> "Payments incident to the performance of the work under this contract made by the Contractor. . .and any disbursement required by laws, regulations or ordinances of the United States of America or of the State, territory or political sub-divisions thereof, wherein the work is done, or for any plant, equipment, process, organization, materials, supplies, personnel or on money received as reimbursement therefor, including permits, licenses, fees, taxes, . . ." (Record 3).

Such contractual liability will not bring constitutional immunity into play. As Justice Douglas stated, with Justice Rehnquist concurring, in a dissent in United States v. Mississippi Tax Commission, 412 U.S. 363 (1973):

> "At least since Alabama v. King & Boozer, . . .state taxes have been up-

held on those doing business with the Federal Government even as respects cost-plus contracts where the terms of the contract force their payment out of the Federal Treasury.[5]

5. In New York v. United States, 326 U.S. 572. . .in discussing the Federal Government's right to levy taxes on New York State's sale of mineral waters, the Court stated, 'In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation of immunity. They also indicate an awareness of the limited role of courts in assessing the relative weight of the factors upon which immunity is based . . .' " 412 U.S. at 386, 387.

In this case, the Texas Supreme Court found Day and Zimmerman to be an independent contractor with the United States (Appendix, p. 28), thus eliminating the question of agency. Article 20.021(A), Title 122A, V.A.T.S. places the legal incidence of the Texas sales tax upon the purchaser, while the tax is collected by vendors at the time of the sale (Appendix, p.4). Day and Zimmerman purchased these supplies from its vendors without paying the taxes by giving "resale certificates" to the vendors attesting to Day and Zimmerman's intention to resell the supplies and not use them itself. Once Day and Zimmerman began using the computer time and these office supplies it became liable for the sales tax pursuant to Article 20.021(I). (Appendix, p. 7).

Petitioner therefore submits that the above-cited authorities conclusively establish that in the case at bar the legal incidence of the taxes rests upon Day and Zimmerman, not the United States, and that constitutional immunity does not invalidate or prevent the assessment of these sales taxes against Day and Zimmerman.

THE "SALE FOR RESALE" ARGUMENT

The decision of the Supreme Court of Texas that the title provision in Day and Zimmerman's contract with the United States /Article VI-B(c), Prime Contract, Record 3/ effected a sale of the supplies from Day and Zimmerman to the United States directly conflicts with previous interpretations by this Court of such contractual provisions. Its misinterpretation of Article VI-B(c) of the Prime Contract caused the Texas Supreme Court to find a "sale for resale" pursuant to Articles 20.01(K)(1), 20.01(S) and 20.04(N). (Appendix, p. 2, 3, 13). When the Prime Contract is properly construed, no such "sale for resale" exists and these statutes are not invoked. The title provision in the Prime Contract states:

> "Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. . ." /Record 3, Art. VI-B(c)/.

In deciding whether the automatic title passage to the United States effects a "resale" of the supplies to the United States, one must look to the definition of "sale for resale" found in Articles 20.01(S) and 20.04(N). (Appendix, p. 3, 13). Article 20.01(S) defines "sale for resale" in part to be:

> "Sale for Resale" shall mean a sale of tangible personal property to any purchaser who is purchasing said tangible personal property for the purpose of reselling it in the normal course of business either in the form or condition in which it is purchased, or as an attachment to, or integral part of, other tangible personal property."

Article 20.01(K)(1) defines "sale" in part to be:

> "Sale" means and includes any transfer of title or possession, or segregation in contemplation of transfer of title or possession,. . .in any manner or by any means whatsoever, of tangible personal property for a consideration. (Emphasis added).

The Court should first observe that Day and Zimmerman is not a purchaser under the above definition of "sale for resale." Day and Zimmerman must be a "purchaser who is purchasing said tangible personal property for the purpose of reselling it. . .in the normal course of business. . ." That Day and Zimmerman was not purchasing the supplies from its vendors for the purpose of resale

and that the transferring of title to the supplies to the United States was not in Day and Zimmerman's normal course of business is plainly shown by Stipulation No. 9, which states:

> "that under the terms of the prime contract the plaintiff's function is to load, assemble and package ammunition and components thereof." (Record 2).

Day and Zimmerman purchased these supplies for its own use and it was not engaged in the type of business which qualified it to use a "resale certificate" in purchasing these supplies.

We first turn our attention to the vendor's sales to Day and Zimmerman and whether these sales are subject to sales tax.

Day and Zimmerman, like the contractor in King & Boozer, purchased in its own name and on its own credit (Record 2, Stipulations 46, 50). Under the cost-plus contract, the United States incurs no liability for these purchases and only reimburses the contractor. Day and Zimmerman purchased from its vendors with purchase order forms which provided that the purchase was between Day and Zimmerman and the vendor without the involvement of the United States. (Opinion of the Texas Supreme Court, Appendix, p. 32).

Clearly, the vendors' transfers to Day and Zimmerman of supplies such as computer time, light bulbs and toilet tissue for consideration constitute sales under Article 20.01(K)(1). (Appendix,

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p. 2). Once this sale is established, Day and Zimmerman becomes liable for the tax unless it can show there was a "resale" to the United States thus invoking the "sale for resale" exemption. /Art. 20.04(N), Appendix, p. 13/.

Thus, under the Texas Sales Tax provisions, Day and Zimmerman's transactions with the United States do not come under the "sale" or "resale" definitions. Moreover, this Court's holding in King & Boozer is squarely against the contentions of Day and Zimmerman and the holding of the Texas Supreme Court. The automatic-passage-of-title provisions in the contract are utilized not to effect "sales" to the United States but to protect the United States from its creditors.

The State of Alabama urged in its brief to this court in King & Boozer that such a title provision is for the primary purpose of eliminating insurance costs, and should be construed as a security provision because the vesting of title in the Government affords protection and security without affecting the contractors' rights to use the material in the discharge of their contractual obligations.

The protection against the independent contractor's bankruptcy is often the rationale behind the United States' employment of these automatic-passage-of-title provisions. See Boeing v. Omdahl, 169 N.W.2d 696 (1969).

In the cases of King & Boozer and Curry, supra, Esso Standard Oil Company, 345 U.S. 495 (1953); United States et al v. the City of Detroit, 355 U.S.

466 (1958); United States v. Township of Muskegon, 355 U.S. 484 (1958); and City of Detroit et al v. Murray Corporation of America et al, 355 U.S. 489 (1958), the United States held "Title" to the goods or property which was the subject or basis of the taxes, yet the assessment against the private taxpayer was upheld.

In City of Detroit v. Murray Corp., this Court spoke to the issue of actual possession and use of property versus "paper title" to property and stated:

> "Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance. This is at least as true to uphold the State tax as to strike one down . . .
>
> It is true that the particular Michigan taxing statutes involved here do not expressly state that the person in possession is taxed "for the privilege of using or possessing" personal property, but to strike down a tax on the possessor because of such verbal omission would only prove a victory for empty formalisms. And empty formalisms are too shadowy a basis for invalidating State tax laws." 355 U.S. at 492,493 (Emphasis added)

In a manner superior to any this Petitioner could muster, this Court, as quoted above, struck a blow

for substantive application of the law and against the rule of law by empty formalism. The position of Day and Zimmerman and the United States depends entirely upon the empty formalism of an obscure title passage provision, the sole reason for which is to protect the United States from its contractor's creditors. Yet, faced with the Texas sales tax, Day and Zimmerman seeks to use that same obscure title passage provision to effect a "sale for consideration" to the United States. This is precisely the "empty formalism" that this Court struck down in City of Detroit v. Murray Corp.

Petitioner acknowledges that the United States Government could bind itself to purchase goods directly from vendors, and in doing so, be exempt from taxation in such a transaction. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), is an example of purchases by a government contractor wherein this Court held the United States was the real purchaser. This Court compared Kern-Limerick with King & Boozer case thusly:

> "The contract here in issue differs in form but not in economic effect on the United States. The nation bears the burden of the Arkansas tax as it did that of Alabama. The significant difference lies in this. Both the request for bids and the purchase order (in Kern-Limerick), in accordance with the contract arrangement making the contractors purchasing agents for the Government . . .contain this identical, specific provision:

> 3. This purchase is made by the Government. The Government shall be obligated to the vendor for the purchase price, but the contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the contractor.
>
> Title to all materials and supplies purchased hereunder shall vest in the Government directly from the vendor. The contractor shall not acquire title to any thereof.
>
> The purchase order is headed 'Navy Department Bureau of Yards and Docks . . .' " 347 U.S. at 119.

Kern-Limerick affirmed the long course of judicial construction which establishes the principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest. 347 U.S. at 121. In the King & Boozer and Kern-Limerick cases, and obviously in this case, the identical, critical issue is who purchased these supplies, the United States or the Independent Contractor. The issue is not one of State law so much as it is one of construing the government's

contract and determining whether the terms of that contract, particularly Article VI-B(c), (the title passage provision) and Article IV-A(1)(j), (the reimbursement provision), trigger the application of Articles 20.01(K)(1) and 20.04(N), to extend the constitutional immunity of the United States to Day and Zimmerman.

In their Application for Writ of Error to the Supreme Court of Texas, Day and Zimmerman and the United States urge that the facts of King & Boozer are startlingly different from the case at bar (App. Writ. Error, Record 8, p. 6). Petitioner submits that two cases are rarely more similar. In both King & Boozer and the case at bar, three parties are identically situated. The United States, via the U. S. Army has entered into a cost-plus contract with an Independent-Contractor (Respondent Day and Zimmerman herein; Dunn Construction Company and John S. Hodgson and Company in King & Boozer) to perform certain tasks (manufacturing munitions herein, erecting a fort in King & Boozer) and in doing so, the United States contracted to reimburse said independent contractors for all labor, materials, tools, machinery, equipment, facilities, supplies, utilities, and services necessary to perform the contract. The contractors in each case purchased supplies from vendors (King & Boozer, a lumber dealer, in the Alabama case; from various vendors in the instant case.)

To decide whether under the prime contract the United States purchased the supplies from Day and Zimmerman, we must look again to the definition of a "sale" in Article 20.01(K)(1), supra. The "resale"

to the United States must satisfy this definition of a "sale." In the transaction at issue, Respondent did not transfer title to the supplies to the United States "for a consideration" as required by the statute. The Supreme Court of Texas overlooked the fact that the Government's contract provided for no consideration for the passage of title to the United States. Title to the supplies passed and vested "in the Government upon delivery of such property by the vendor." /Article VI-B(c), Prime Contract, Record 37. The passing of title did not depend on any acts performed either by Day and Zimmerman or the United States.

Pausing for a moment to regroup our thoughts, we observe just what transactions occurred between the United States and Day and Zimmerman. The United States contracts with private contractors such as Day and Zimmerman to secure that contractor's "know-how." At the trial of this case, testifying for Day and Zimmerman and the United States, Colonel Richard Huff, the contracting officer's representative under this contract, stated the reasons for employing such independent contractors: "They, (the Army) hire a contractor to come in and start the facility and run the facility. They hire 'know-how' the quickest way they can, and that is hiring an experienced contractor to do the job." To paraphrase the brief of the State of Tennessee to this Court in the case of United States v. Boyd, 378 U.S. 39 (1964):

> "What any contractor is paid for is the exercise of his knowledge, skill and labor in effectuating designated work, whether

> the work be the delivery of a completed edifice or structure, or the continuous management and operation of an industrial complex. He is not in any real sense a dealer in materials for profit. His undertaking consists usually of taking materials, whether procured by himself or others, and changing their form or identity so something new is created. It is for his knowledge, ingenuity, and skill in the application of labor that he is compensated, and that compensation forms his primary, if not exclusive, motivation for his efforts." (Reply Brief of Appellee, p. 42, 43)

What the United States received when it contracted with Day and Zimmerman was Day and Zimmerman's "know-how." Thus the money that changes hands under this contract, the reimbursement for costs and the fixed fee, is paid to Day and Zimmerman by the United States Army for Day and Zimmerman's technical expertise, and not for supplies or even for materials procured under this contract. These reimbursements and the payment of the fixed fee can in no way be taken as consideration for the automatic transfer of title to consumable supplies to the United States.

Consideration is defined as "the price bargained for and paid for a promise." (Simpson on Contracts, 2nd. Ed., p. 80). Black's Law Dictionary states further:

> "The inducement to a contract. The

> cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract." (4th ed., Page 379).

The United States argues that the moneys it reimbursed to Day and Zimmerman under Article IV-A of the contract constitute the consideration for a sale. In looking to the definition of reimbursement in Black's Law Dictionary at page 1452, we find that the primary meaning of this word is

> "To pay back, to make restoration, to repay that expended; to indemnify, or make whole."

The Prime Contract calls for "reimbursement," not for "consideration." The United States reimburses Day and Zimmerman for the "cost of its operation of LSAAP" (Record 2, Stipulation 14) and for the "cost of the property purchased by Day and Zimmerman." /Record 3, Art. IV-A(1)(j), Prime Contract/. This reimbursement is not equivalent to consideration.

The United States never paid a "consideration" to Day and Zimmerman for a transfer of title to the consumable supplies. This is even more obvious when one considers that Day and Zimmerman consumed all of these supplies internally in its performance of the prime contract. Day and Zimmerman, and not the United States, used the pencils, stationery, light bulbs and computer time. (See Record 2, Stipulations 58 and 59). The United States

never used or directly benefitted from the items consumed by Day and Zimmerman, and could not use them for its own benefit. It would be ridiculous to burden the United States with paying good and valid consideration (in the form of the reimbursements) for the title to supplies wherein the passage of title did not effect an actual transfer or shift in the use of the goods to the United States. That the United States was "reimbursing for costs" and not providing "consideration for a transfer of title" is the key issue which the Texas Supreme Court failed to see. In its opinion (Appendix, p. 31) the court states:

> "In determining whether a sale took place between Day and Zimmerman and the Federal Government, the pertinent inquiry to be made under the facts of the instant case and the definition of a sale set out above is whether there was a transfer of title or possession from Day and Zimmerman to the United States."

The Court glaringly omitted the phrase "for consideration" from its interpretation of the contract and equated the transfer of title provision in the Prime Contract with the transfer of title in Article 20.01 (K)(1) of the Texas Sales Tax Act. The fallacy in equating these two transfer provisions is evident in that the transfer of title to the United States under the Prime Contract is not dependent on the payment of a consideration. Therefore, it is not a "sale" because the transfer of title in Article 20.01(K)(1) is expressly dependent on consideration. (Appendix, p. 2).

The automatic title passage to the United States is a transfer without consideration and cannot be the type of transfer which constitutes a sale under Texas Sales Tax Law. Justice Douglas, in his dissent in Kern-Limerick, aptly points out the fallacy in attributing magical qualities to contractual terms when deciding cases of Constitutional significance. He stated that the two paramount issues of a case such as this are to ascertain the "substance of the transaction" and the "nature of the economic burden on the United States." He went on to say:

> "The concepts 'title', 'agency', and 'obligation to pay' are no basis for this constitutional adjudication. Today they are used to permit any government functionary to draw the constitutional line by changing a few words in a contract. When the Congress deliberates over this problem as it often has, it does not worry about the passing of title or other legal technicalities. The Congress debates whether as a matter of policy, including the need of the states for revenue the holder of a cost-plus government contract should be immune from state taxation.
>
> Alabama v. King & Boozer and the cases it followed were a long step forward from the time when a state's power to tax was nullified whenever the federal treasury was even remotely affected. We should not take this equally long step backwards. We should hold that until the Congress

> says differently, the states are free to tax all sales to cost-plus government contractors. We should dispense with fruitless talk of agency, titles, and obligations to pay. The legal incidence of a tax is a matter for the states to determine. We should decide today, as we did more than a decade ago, that a tax on a contract for goods he uses is constitutional, even though the economic burden falls on the federal government. (347 U.S. at 126, 127) (Emphasis added).

Furthermore, because the facts in the case at bar are so clearly parallel to those in King & Boozer and the other cases cited, and are so unlike those in Kern-Limerick, Petitioner urges that the United States, under Texas law, is not a purchaser of these consumable supplies. It does not use them and pays no "consideration" for them. Therefore, there can be no "sale" of these supplies from Day and Zimmerman to the United States. If there is no such "sale," then it follows there can be no "sale for resale" by the vendors to Day and Zimmerman. The "sale for resale" exemption being the means by which Day and Zimmerman seeks to evade the tax, the nonavailability of such exemptions places the legal incidence of the sales tax for these consumable supplies purchased and used by Day and Zimmerman squarely on Day and Zimmerman as the ultimate purchaser and user thereof.

CONCLUSION

It is respectfully submitted that the decision of the court below is incorrect and that a writ of certiorari should issue in this case to review the matter and thereafter the judgment of the Supreme Court of Texas should be reversed.

Respectfully submitted,

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I, RICK HARRISON, Attorney for Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of May, 1975, three copies of the foregoing Petition for Certiorari to the Supreme Court of the United States were served upon the Attorneys for Respondent and Intervenor, Mr. Charles J. Hlavinka at Post Office Box 1049, Texarkana, Texas, 75501, and Mr. Hugh P. Shovlin, Assistant United States Attorney at Post Office Box 1701, San Antonio, Texas, 78206, by mailing same by United States Mail, first-class postage prepaid; the Solicitor General of the United States, United States Department of Justice, Washington, D. C., 20530, and Mr. David English Carmack, Attorney, United States Department of Justice, Washington, D. C., 20530, by mailing same by United States Mail, Air Mail postage and prepaid.

Rick Harrison

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